Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

Thomas A. Martin, Petitioner

v.

KeyCorp, Key Bank National Association (f/k/a Key Bank of New York, N. A., Key Bank of Southeastern New York), Robert G. Qulia.

Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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61 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the use of unpublished opinions by the circuit courts of appeals, the role of staff attorneys in their preparation and the restricted precedential value of most of those opinions violates the right of the affected appellants to procedural due process and equal treatment under the law, rights guaranteed by the Fifth Amendment to the Constitution?

2. Whether the Second Circuit's lack of rules (a) establishing specific legal criteria for determining which opinions should be unpublished, (b) establishing rights of appellants to request publication of an unpublished opinion and (c) conveying precedential value to unpublished opinions, all regulated in other circuit courts, violates Second Circuit appellants' constitutionally guaranteed right to equal treatment under the law and contributes to an untenable inter-circuit conflict with respect to appellants' rights ?

3. Whether the procedures of the Second Circuit that segregate civil appeals into two classes of appellants (counseled cases and those in which at least one party is appearing *pro se* and is not an attorney) that are then treated differently and unequally violates *pro se* appellants' constitutionally guaranteed rights to due process, specifically to equal treatment under the law?

4. Whether an attorney, a salaried employee of a law firm, who represents a client of the law firm in a civil litigation and who has no other relationship with the client, is in privity with the client?

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner Thomas A. Martin ("Martin") appearing *pro se* respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case that affirmed the decisions of the United States District Court, Northern District of New York.

OPINIONS BELOW

The Summary Order of the Court of Appeals (App., *infra*, a1-a4) is unpublished. The memorandum-decision and order of the District Court (App., *infra*, a5-a19) is unreported.

JURISDICTION

The Summary Order of the Court of Appeals was filed on November 7, 2002. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND LOCAL RULES INVOLVED

The Fifth Amendment to the Constitution of the United States, Title 28 U.S.C. Sections 453, 1291 and 1654 and the Northern District of New York Local Rule 0.23 are set out in full at App., *infra*, a20-a22.

STATEMENT

Petitioner Martin filed a bankruptcy petition in 1992 listing respondent Key Bank National Association ("Key Bank") as one of his creditors. Key Bank commenced an adversary proceeding seeking denial of the discharge of Martin's debts. Respondent Robert G. Qulia ("Qulia"), then an employee of the law firm representing Key Bank

in the action, appeared on behalf of the bank during the adversary proceeding trial in 1994.

Several days following the conclusion of the trial but prior to a decision, the trial Judge without notice to Martin or his then attorney, in open court read into the record a statement wherein he said that he had been informed by two named court personnel that, following court adjournment on the last day of the trial, Martin had threatened Qulia. The Judge treated the allegations as facts and excoriated Martin for the purported conduct.

Subsequently the Judge found for the plaintiff, Key Bank, and in his decision - despite the fact that there had never been a hearing nor had Martin been allowed to defend himself - cited the alleged threats to Qulia as facts, facts that clearly influenced his ruling.

Knowing that the allegations regarding threats of Qulia were false, Martin in 1995 moved pursuant to Fed. Rules of Bankruptcy Procedure ("FRBP") Rule 2004 to examine Qulia concerning the alleged threats. Key Bank opposed the motion, and it was denied.

In 1997 Martin again moved pursuant to FRBP Rule 2004 to examine the named court personnel who purportedly had heard the threats and reported them to the trial Judge. At a transcribed hearing on the motion, an Assistant U.S. Attorney appearing on behalf of the named court personnel opposed the motion on the grounds: that the court personnel had not been the source of the information to the trial Judge, but that Qulia had contacted the judge directly and provided the

information himself. Martin's motion was denied.

This disclosure demonstrated that Qulia was guilty of attempting to influence the outcome of the 1994 trial, a violation of Martin's rights as spelled out by Title 42 U.S.C. Section 1985 (2) and a violation of FRBP Rule 9003, which prohibits *ex parte* contacts with the Judge.

Based upon this information, Martin commenced a new action in District Court against Key Bank, its (by then) corporate parent KeyCorp, and Qulia, who by this time was an employee of Key Bank, alleging a violation of 42 U.S.C. Section 1985 (2).

By a series of letters to the District Court Clerk, Northern District of New York, the attorney for the three defendants sought and obtained assignment of the case to a judge of their choice, despite the policy of the District to assign cases randomly, Martin's written objections, and the obvious, inherent impropriety of "judge selection" by any party.

Martin timely moved for the recusal of the selected judge. Defendants opposed the motion and the selected judge denied it.

Defendants then moved for summary judgment dismissing Martin's complaint on the grounds of claim and issue preclusion due to a 1995 Fed. Rules of Civ. Pro. ("FRCP") Rule 60(b) motion by Martin in the bankruptcy court seeking a review of the 1994 trial decision. They sought to include Qulia in this defense by arguing that in 1994 when he was merely an employee of the law firm acting as Key Bank's counsel, Qulia, although not a

party, was a privy of his firm's client, Key Bank, citing *Browning Debenture Holders' Comm. v. Dasa Corp.*, 454 F. Supp. 88, 104 (S.D.N.Y. 1978). They did not claim any identity of incentives between Qulia and his firm's 1994 client or allege any other facts that would establish a relationship in privity.

Martin opposed the motion and, with respect to the issue of Qulia's entitlement to privity, pointed out that the decision in *Browning Id.* was not conclusive because (a) district court rulings lack binding precedential effect, and furthermore, the Court in *Browning* at 105 equivocated on the issue by saying, "Thus even if it could be argued that these additional parties (one being the attorney) were not privies of Dasa.."; (b) the Second Circuit in *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 346 (2nd Cir.1995) years later clarified the issue, holding that, absent an identity of incentives, the application of claim preclusion against a plaintiff would violate elemental justice and due process, effectively, (but not specifically) overruling *Browning*; (c) in 1994 there was no identity of incentives between Qulia and Key Bank, he was a salaried employee of his law firm which was representing Key Bank on an hourly fee arrangement, nor were any incentives claimed; and (d) Qulia was accused of a serious violation of Martin's right to a fair trial.

The Judge granted defendant's motion and, in an unreported but internet-available Memorandum-Decision and Order dated September 29, 2000 (App., *infra*, a5 - a19), conceded privity to Qulia and, on this

basis, extended to him the defense of claim preclusion (App., *infra*, a14 - a15). The decision as to the corporate defendants was barely within the Judge's discretion; as to Qulia, it was beyond discretion.

During discovery in an unrelated matter, in 2000 Martin obtained a 1994 pre-trial letter (App., *infra*, a22 - a23) written by Qulia to Martin's ex-wife, in which Qulia instructed her how she was to testify - untruthfully - on two material points. She had been a trustee of two trusts established by Martin in the mid-eighties and had collateral property in her possession when the letter was written and on the day she testified. Qulia's letter directed her to say that there were no such trusts and that she had no collateral in her possession.

She testified as instructed at the 1994 trial and was rewarded for her perjury: Key Bank allowed her to retain the collateral, worth approximately $15,000.00.

The letter demonstrated that, immediately prior to the trial, Qulia (in addition to his improper efforts to influence the trial judge by alleging he had been threatened by Martin) had suborned perjury, sat silent in the presence of perjured testimony, and participated in compensating the perjurer.

Shortly thereafter, Martin filed a FRCP Rule 60 (b) motion based on, among other things, the new evidence of perjury. The Court denied the motion and imposed sanctions on Martin for having filed it.

Martin timely filed a consolidated appeal in the Second Circuit Court of Appeals that had jurisdiction

pursuant to Title 28 U.S.C. Section 1291. An issue presented for review was the Judge's gratuitous grant of privity to Qulia. Pursuant to the procedures of the Second Circuit, Martin's appeal was segregated from counseled appeals and assigned to the staff attorney pool.

In his brief and in his reply brief, Martin specifically requested, if the Court was going to affirm the appealed decision, that it do so in a published opinion having precedential value.

The Second Circuit Court of Appeals affirmed the District Court's judgment (App., *infra*, a1 - a4) in an unpublished Summary Order ("the Order"), denied precedent except in related cases for preclusive purposes, dated and filed on November 7, 2002, and signed only by the Court Clerk.

With respect to the issue of privity, the Order was silent, but it included the following statement: "We have considered all of Martin's arguments and find them without merit".

The Order effectively conceded, *de facto*, privity to a party's attorney despite the absence or claim of any identity of incentives between them, the well-established traditional definition of privity, and the precedent set by the Court's own decision in *Chase Manhattan supra*, a case cited and relied on by Martin in his appellate brief.

REASONS FOR GRANTING THE PETITION

This Court should review the Second Circuit's unpublished Summary Order ("the Order") in this case (dated November 7, 2002) and address the four questions summarized below and expanded on in subsequent sections.

I. With respect to questions 1 and 2 there is an ongoing national debate regarding the constitutionality of (a) unpublished opinions, (b) the procedures employed to produce them, (c) their denied precedential value in most circuits and (d) the conflicting rules of the individual circuits regulating those practices, all four of which require resolution by this Court. These issues impact thousands of cases nationwide each year. The fact that there is a proposed rule which implicitly acknowledges that there is a problem and which, if adopted, would grant precedent to unpublished opinions in all circuits, should not deter this Court from resolving the debate.

II. With respect to question 3, the policy of the Second Circuit to segregate appeals into two classes, a practice that is in conflict with prior decisions of this Court and with the right to equal treatment for all appellants, should be addressed and corrected. The Second Circuit's structural bias affects thousands of impoverished appellants annually.

III. With respect to question 4, the principal reason for this Court to grant the petition is that the challenged,

affirmed lower court decision stands as questionable but citable new law with broad ramifications.

IV. The "crisis" in the courts, addressed by Chief Justice Rehnquist in his 2002 annual report, adversely impacts citizens seeking their guaranteed due process. The failure of the legislative branch to address and fix the problem is a generally unrecognized national disgrace.

The Equal Protection Clause of the Fifth Amendment:

This Court has consistently held that the Fifth Amendment to the U. S. Constitution guarantees to all citizens the equal protection of the laws. *Truax v. Corrigan*, 257 U.S. 312, 331 (1921). And this Court has frequently acknowledged that the Fifth Amendment equal protection is the same as Fourteenth Amendment equal protection. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) citing *Weinberger v.Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975).

The procedural due process doctrine of the Fifth Amendment mandates fairness, protecting individuals from arbitrary judicial action.[1] And the equal protection clause of the Amendment directs that "all persons similarly circumstanced shall be treated alike". *Plyer v. Doe*, 457 U.S. 201, 216 (1982) quoting *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

The equal protection clause of the Fifth Amendment has direct application to Martin's first three ques-

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[1] 50 Kan L. Rev. 195, 211, *Comment: Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*, Jon A. Strongman.

tions, analysis of which follows, with the cited case law incorporated into each by reference.

Question No. 1 – Unpublished Opinions:

According to the Judicial Business Of United States Courts (page 40, Table S-3) for the year ending September 30, 2001: 80.4% of all 28,840 opinions filed by circuit courts in cases terminated on the merits, after oral hearings or on submission on briefs, were unpublished, and most had no, or limited, precedential value. In the Second Circuit, that percentage was 78.2%, none having precedential value.

Since inception of the unpublished opinion practice (at or around 1973), the number of appeals filed annually and the percentage disposed of by unpublished opinions has grown exponentially. Criticism of the practice, much of which is found in respected law review articles, is also on the rise.

Although fewer in number, there are also articles defending the practice. They tend to rest on two arguments: first, given the workload of the circuit courts, it is administratively essential; and second, many appeals do not warrant published opinions. In short, the end, i.e. administrative efficiency and selective appellate review, justifies the means, resulting in a diminution of justice, an inversion of our national priorities and a modified interpretation of U.S.C. Title 28 Section 1291.

If, however, as argued herein, this violates the constitutionally guaranteed rights of certain appellants and compromises public confidence in the appellate process,

the price paid is unacceptable. Therefore, this practice must be addressed and modified, as petitioned.

In 1976, this Court granted a writ of *certiorari* to a petition seeking, among other things, review of the "burgeoning trend towards 'secret law' in the United States Courts of Appeals". *Browder v. Director, Ill. Dept. of Corrections*. This Court reversed the lower court decision in *Browder* and, with respect to the issue of unpublished opinions, said, "Finally, petitioner questioned the validity of the Seventh Circuits' 'unpublished opinion rule'. We leave these questions for another day." *Browder v. Dir., Ill. Dept. of Corr.*, 434 U.S. 257, 258-59 f. 1 (1978).

Given that many, if not all, "unpublished opinions" are currently available in online databases such as Westlaw, LEXIS and Findlaw, as well as on some circuit court web sites, the term "unpublished" is a misnomer, now merely meaning unpublished in the Federal Reporter.

Despite this development, criticism of the practice continues unabated, focusing on (a) the vastly expanded role in the appellate process of law clerks, particularly the role of staff attorney law clerks, (b) the adverse impact of unpublished opinions on the chances of the losing party obtaining access to this Court, (c) the diminished quality of the opinions, reduced judicial accountability, secrecy, and the potential for arbitrary judicial conduct, (d) disparate, discretionary treatment of appellants, (e) tendency to foster judicial inconsistency, and (f) the limiting of precedent to the opinions in most circuits.

In 1985, D. C. Circuit Court Judge Wald, in a separate statement to the decision in *National Classification Comm'n v. United States*, 765 F.2d 164, 173 n.2 (D.C. Cir. 1985), said in reference to unpublished opinions that they "increase the risk of nonuniformity; allow difficult issues to be swept under the carpet; and result in a body of 'secret law' practically inaccessible to many lawyers."

Some authoritative commentators even question the authority of the judiciary to make arguably sweeping changes that are tantamount to modifying 28 U.S.C. Sec. 1291 without the prior consent of the legislative branch.

Para-judges-"Ghostwriters"[2] : "The caseload per judge has risen to the point where very few judges, however able and dedicated, can keep up with the flow without heavy reliance on law clerks, staff attorneys and sometimes externs too."[3] The growth in the number and influence of staff attorneys has been called "cancerous."[4] According to Chief Justice Rehnquist in an address given over 10 years ago, in many "routine" cases staff counsel often prepare "unpublished decisions."[5] It is not clear what criteria are employed to identify "routine" cases or who makes those decisions. Are not all appellants "simi-

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[2] 62 U. Chi. L. Rev. 1421, 1423-24 (1995) *Judges Writing Styles (And Do They Matter?)*, Richard A. Posner

[3] *Ibid.*

[4] 129 U. Pa. L. Rev. 777, 787 (1981) *Bureaucratic Justice: An Early Warning*, Wade H. McCree, JR.

[5] Wis. L. Rev, Vol. 1993, Number 1, 10, *Seen In A Glass Darkly: The Future Of The Federal Courts*, Chief Justice William H. Rehnquist.

larly circumstanced?" *Plyer supra*.

The Chief Justice went on to say that " Under the circumstances, inconsistent interpretations among the circuits become the rule, and consistency has even become difficult to obtain within a circuit". Yet, years later, the practice continues.

If, because of work overload, staff attorneys decide cases by actually writing decisions or by writing bench memos that recommend decisions, the result is troubling. Certain cases are disposed of on the basis of staff attorney memoranda.[6] And there is scant public information regarding who hires staff, what their qualifications are, how they are supervised, or how long they stay on the job. [7]

In the Second Circuit, staff attorney law clerks are merely required to possess a Juris Doctor from an accredited law school (see letter from Second Circuit Executive dated Dec. 13, 2001,App., *infra*, a26-a27) and are supervised by senior staff attorneys, not by Article III judges.

Data contained in Judicial Busness *supra* and Federal Court Management Statistics for the year ended September 30, 2001 illustrate not only the workload problem but also the mass production justice that is occurring.

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[6] See Stephen Breyer, The Donahue Lecture Series: Administering Justice In The First Circuit, 24 Suffolk U. L. Rev. 29, 33, 43 (1990).

[7] 81 Cornell L. Rev. 273, 290, *Elitism, Expediency, and the New* Certiorari; *Requiem for the Learned Hand Tradition*, William M. Richman & William L. Reynolds.

That year, there were 28,840 unpublished decisions, 5,641 published decisions, 167 judgeships, and 55.7 panels. This equates to an average of 664 opinions per week and 12 opinions per panel per week, 10 unpublished.

Based on these facts, it stands to reason that the cases destined for an unpublished opinion receive little or no panel attention. The decisions in these cases are heavily, perhaps totally, influenced by staff attorney bench memoranda, not by Article III judges. In the words of an elite ABA committee, practitioners "may believe, sometimes correctly, that cases are decided effectively by someone other than an Article III judge." [8]

If so, some appellants received something less than their entitled procedural due process: fair, careful consideration of the facts and the law related to the appeal by a circuit court panel of Article III judges.

The truncated Summary Order affirming the District Courts' decision in Martin's case was based at least in part on a bench memoranda that is (a) not subject to the Freedom of Information Act and (b) was prepared by a recent law school graduate. It does not directly address most of the issues raised by Martin.

Irrespective of potentially unsettling consequences to circuit court administration, this petition should be granted in order to address this problem of mass-pro-

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[8] See Frank A. Kaufman *et al.*, Report of the American Bar Association Standing Committee on Federal Judicial Improvements, reprinted in, the United States Courts Of Appeals: *Reexamining Structure And Process After A Century of Growth*, 125 F.R.D. 523, note 8, at 548.

duced, secret, virtually "rubber stamp" justice.

The Quality of Unpublished Opinions: "The costs of non-publication are not limited to reduced predictability, accountability, responsibility, and reviewability. It should come as no surprise that unpublished dispositions are also dreadful in quality."[9]

Former Chief Judge Markey of the Federal Circuit once told his Circuit Conference that unpublished decisions were "junk" opinions.[10]

In view of comments like these, interested parties are justified in concluding the rights of many appellants have been violated. The fact that such rulings are now available on the Internet hasn't solved the problem; as long as these opinions are not given precedential value, quality will not improve.

Limiting the Precedential Value of Unpublished Opinions Diminishes Justice: In 1973 the Advisory Council for Appellate Justice issued a report formally advocating limiting the number of published opinions[11] and recommended that unpublished opinions not be precedent.

In 1973, there were no generally accessible databases; unpublished meant unavailable. If unavailable to most parties, in fairness, precedent should be denied.

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[9] Richman & Reynolds, *supra* note 7 at 284.

[10] Richman & Reynolds, *supra* at 284 quoting from Chief Judge Howard T. Markey, Remarks at the Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 24, 1989), in F.R.D. 409, 414 (1989).

[11] *Comm. on Use of Appellate Court Energies of the Advisory Council on Appellate Justice, Standards for Publication of Judicial Opinions*, FJC Research Series No. 73-2 (1973).

However, the advent of Westlaw, LEXIS and Findlaw and their publication of opinions has rendered that argument for denying precedent moot.

Today, all thirteen circuit courts issue unpublished opinions, yet they do not agree on the precedential value of those opinions. This compounds the inequity. As of Jan. 1, 2003, five of the thirteen have rules denying precedential value to unpublished opinions, excluding their citation except as the basis for preclusion in related cases.[12] Five circuits allow citation of published opinions not as precedent but as persuasive authority.[13] Three circuits give precedential value to unpublished opinions.[14]

The troubling variations in all circuit court rules regarding unpublished opinions are addressed under question 2 below.

In August 2000, the Eighth Circuit Court of Appeals in *Anastasoff v. United States*, 223 F. 3d 898, 899-900 (8th Cir. 2000) held that denying precedential value to unpublished opinions was "unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the 'judicial'."

A subsequent decision, *Anastasoff v. United States*, 235 F. 3d 1054 (8th Cir. 2000) (*en banc*) vacated as moot the prior decision. However, the theory of the first decision

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[12] 1st Cir. R. 36(b)(2)(F); 2nd Cir. Sec. 0.23; 7th Cir. R. 53(b)(2)(iv); 9th Cir. R. 36-3; Fed. Cir. R. 47.6(b).

[13] 3rd Cir. I.O.P. 5.3, 5.8; 5th Cir. R. 47.5.4; 8th Cir. R. 28A(i); 10th Cir. R. 36.3; 11th Cir R. 36-2.

[14] D.C. R. 36 (c)(2)& 28(c)(1)(B), 4th Cir. R. 36 (c); 6th Cir. R. 28(g).

remains alive and in dispute.

Some have argued that denying precedential value to unpublished opinions violates the Fifth Amendment due process clause.[15]

In *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) Chief Justice Rehnquist said in his opinion "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."

By denying precedent to unpublished opinions, courts can arbitrarily ignore or even contradict its previous decision.[16] Courts can arbitrarily affirm decisions that they might not affirm if precedent was attached.

For example, if the lower court decision in this case that attorneys are privies of their clients is acceptable new law, why shouldn't it be conceded precedential value, published in the Federal Reporter, and made available to all others similarly situated?

If all opinions, published and unpublished, were deemed precedent, the potential for error, less-than-thorough appellate review, and chicanery would be greatly diminished.

Question No. 2 – Inconsistent, Contradictory Circuit Court Rules Regarding Unpublished Opinions:

Although the Federal Judicial Center in its 1973

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[15] Strongman *supra* note 1, page 14 at 196.

[16] *Id.* at 212.

Advisory Council Report[17] offered a model rule for opinion publication, the rules actually adopted by the individual circuit courts vary considerably.

With respect to publication, the rules of the District of Columbia, First, and Fifth Circuits favor publication.[18] The other ten circuits establish a presumption against publication.[19]

Furthermore, some circuits have detailed criteria as to how publication decisions are made including the D.C., 4th, 5th, 6th, 7th, 8th, 9th, and 11th. The others, including the 2nd, provide only general guidance.

The differences continue with respect to whether unpublished opinions are precedent,[20] and who makes the publication decision: the author of the panel's decision, the entire panel, the authors of the separate opinions, or the entire court.

The circuit courts also differ on whether an appealing party, or any party, may request publication of an unpublished opinion. Five circuit courts have local rules that address this issue and provide for it.[21]

Further compounding the variations between the circuits is the degree to which the circuits employ the

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[17] *Supra*, note 11, page 14

[18] D.C. Cir. R. 14(A); 1st Cir. R. 36.1; 5th Cir. R. 47.5.1.

[19] 2nd Cir. R. 0.23; 3rd Cir. I.O.P. 5.5.1; 4th Cir. I.O.P. 36.4; 6th Cir. R. 26; 7th Cir. R. 53(A); 8th Cir. App.I; 9th Cir. R. 36-2; 10th Cir. R. 36.1; 11th Cir. I.O.P. Opinions FRAP 36; Fed. Cir. R. 47.8

[20] *Supra*, notes 12, 13 and 14.

[21] 1st Cir. R. 36.2; 5th Cir. R. 47.5; 7th Cir. R. 53(d)(3); 9th Cir. R. 36-4 and D.C. Cir. R. 36(d).

practice. In 1999, the Fourth Circuit published opinions in only 9.9% of cases disposed of on the merits, while the First Circuit published opinions in 54.6%.[22] Differences in workload and case types cannot explain such a wide disparity.

Local rule 0.23 of The Second Circuit set out in full (App., *infra*, a21) is amorphous; it contains no criteria for publication. Furthermore, it makes no provision for a party to request publication (as Martin did twice, in his brief and his reply brief), nor does it concede precedent as others do.

Critics contend that opinions establishing precedent tend to be more uniform, more thorough, more thoughtfully and correctly prepared, more consistent with previously established precedent and therefore, in sum, more consistent with due process. The authors would be accountable, a benefit absent from opinions that are not precedent.

If this is true, appellate parties in those circuits that concede precedent to unpublished opinions and/or that rarely deny publication have a distinct, substantive, unfair advantage over those similarly situated in the other circuits.

It is Martin's contention that the rule of the Second Circuit, one of the most amorphous yet restrictive of the 13 circuits, violates his right to procedural due process. If precedent is constitutional in three circuits, how can

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[22] Judicial Business of the United States Courts: 1999 Annual Report of the Director 49 tbl. S-3 (2000).

denial of precedent in the Second Circuit meet the due process, equal treatment requirements of the Fifth Amendment?

This Court should grant this petition so that this inter-circuit confusion, contradiction, procedural unfairness can be addressed and cured.

Question No. 3 - Segregation of Appellants:

Appeals to the Second Circuit Court of Appeals in civil cases are segregated into two classes; counseled cases and *pro se* cases. See letter from Second Circuit Executive dated Dec. 13, 2000, App., *infra*, a24 - a25.

There is no explanation or justification for this practice in the local rules of the Court or in the 2nd Cir. Handbook (now available only on the Court's web site, ca2.uscourts.gov).

Title 28 U.S.C. Section 1291 (App., *infra*, a20 - a21) makes no such distinction and Section 1654 (App., *infra*, a21) clearly provides for a party to conduct his or her own case with no indication that those who do so will be treated differently. And the judicial oath contained in Section 453 (App., *infra*, a20) requires equality for all, rich and poor.

In the Second Circuit, however, there are two material ways in which discrimination occurs.

First, Second Circuit counseled cases are assigned to chambers where chambers law clerks prepare bench memoranda (Letter dated December 13, 2000 *supra*).

Bench memoranda in *pro se* cases, however, are prepared by law clerks in the Court Staff Attorney's Office,

which memoranda "may include the author's evaluation of the merits of the issues on appeal and offer recommendations for decision." See Dec. 17, 2001 letter from Second Circuit executive, App., *Infra*, a26 - a27. Elsewhere in this petition, on pages 11 and 12, the role of staff attorneys and the limited available information about them is set out and analyzed in some detail.

Second, there is a difference in the law clerk time available to appeals. The following statistics clearly illustrate the inequity. During the 12 months ended September 30, 2000 there were 4,931 appeals filed in the Second Circuit: 2,063 were *pro se*; 2,868 were counseled. See letter from the Circuit Executive dated Jan. 3, 2002, App., *infra*, a28 - a29.

During the period August 2000-August 2001, the Second Circuit employed 68 judicial law clerks and 21 staff attorney law clerks all qualified to write bench memoranda. *Id.*

Although the two twelve-month periods are not identical, they do overlap, and it is reasonable to assume that the number of law clerks by category was the same or close thereto from September to September. If so, there were 98.23 *pro se* appeals per staff attorney and 42.17 counseled appeals per judicial law clerk. Clearly, counseled cases receive considerably more law clerk attention than do *pro se* appeals.

Even if some counseled appeals are more complicated than some *pro se* appeals (which include prisoner appeals), the disparity in the cases per clerk is sufficient

to sustain an inference of inequality.

Furthermore, the workload of the staff attorneys also includes preparation of bench memoranda for all civil appeal motions, *pro se* cases, and counseled cases (Letter dated December 13, 2000 - App., *infra*, a24 - a25), all diminishing the time available for preparing bench memoranda on *pro se* appeals.

The discriminatory segregation of appellants and unequal treatment of the segregated appeals violates parties' Fifth Amendment guaranteed right to procedural due process: fair and equal treatment. And this Court has consistently held that treating parties similarly situated differently is wrong. *Plyer supra*. In this context, the similarity is parties appealing lower court decisions. Not having retained counsel, as is clearly permissible under 28 U.S.C. Sec. 1654, is not a justifiable basis for deeming them dissimilar. Alternatively, if it is a valid dissimilarity, then a second distinction is justified: between *pro se* non-prisoners and *pro se* prisoners. Why should citizens in good standing be commingled with an avalanche of prisoners' appeals?

This Court has held that segregation for administrative convenience, as may be the case in the Second Circuit with respect to appeals, is constitutionally invalid. *Schlesinger v. Ballard*, 419 U.S. 498, 507 (1975) citing *Frontiero v. Richardson*, 411 U.S. 677 (1973) and *Reed v. Reed*, 404 U.S. 71, 76-7 (1971).

This Court has also held that the Due Process Clause of the Fifth Amendment prohibits invidious dis-

crimination between individuals and groups. *Washington v. Davis*, 426 U.S. 229, 239 (1976) citing *Billing v. Sharpe*, 347 U.S. 497 (1954).

In the landmark case of *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court held that in the field of public education the doctrine of "separate but equal" has no place and that segregation violates the equal protection clause of the Fourteenth Amendment. *Id.* at 495.

Conceding the valid sociological component of the education issue resolved in *Brown, Id.* and the importance of education to our society, Martin argues that assuring justice consistent with the ideals of the Constitution is no less important than education.

This Court held in Schlesinger *supra* at 498 that the equal protection clauses of the Fourteenth Amendment and the Fifth Amendment provide equivalent rights.

The procedure of the Second Circuit that segregates appeals from counseled appeals and treats them differently and unequally (for whatever reason: administrative, or invidious, i.e. economic, the ability of the appellant to afford and mobilize private legal assistance) is an unfair, discriminatory structural bias.

Question No. 4 – Privity Redefined And Extended:

The District Court in this case held that respondent Qulia, an attorney, was in privity with his firm's client, the plaintiff in the 1994 trial, despite the absence of any identity of incentives between either Qulia or his employer and the client. This decision, which was affirmed by the Circuit Court's unpublished Order, is in

conflict with (a) the prior decisions of the Circuit Court itself, (b) the well-established definition of privity, (c) the decisions of all other circuit courts (d) the decisions of the relevant state court of last resort and (e) 47 Am. Jur. 2d Judgments Section 668.

In so doing, the District Court relied on the argument advanced by defendants in an equivocal 1978 district court decision (*Browning supra),* ignoring the Second Circuit's 1995 decision in *Chase Manhattan supra* that held unequivocally that an identity of incentives was essential to privity.

The New York State Court of Appeals in *Watts v. Swiss Bank Corporation,* 27 N.Y 2d 270, 317 N.Y.S.2d 315, 265 N.E.2d 739 (1970) said that privies are either "successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and possibly coparties to a prior action". None of these criteria apply to Qulia in this case.

The Fourth Circuit Court of Appeals held in *Comite de Apoyo a los Trabajadores Agricolas v. U.S. Dep't. of Labor,* 995 F.2d 510, 514 (4th Cir. 1993) that "privity attaches only to those parties whose interests in a given lawsuit are deemed to be aligned".

All other circuit courts have reached a comparable conclusion with respect to the ingredient essential to establish privity for purpose of enjoying claim preclusion. And none have ever deemed an attorney lacking any other relationship with his client to be a privy of his

client, much less one accused of a crime while acting on behalf of his client.

47 Am. Jur. 2d Judgments Section 668 is, not surprisingly, consistent with the cited case law with the exception of the hedged decision in *Browning supra*, the decision relied on by the District Court. The cited section provides the following examples of identity of incentives; privies in blood, privies in representation, privies in estate, privies in respect to contract, privies in possession and privies in law. None apply to the relationship between Qulia and his firm's client, Key Bank.

What the District Court did in this case in granting privity to Qulia went beyond the bounds of judicial discretion, ignoring all relevant precedential case law and establishing new law on the point. If intentional, it also demonstrates prohibited bias: pro-Qulia and/or anti-Martin. This was done in the face of serious, well-documented charges against Qulia, thereby protecting him from disciplinary action if found guilty and concurrently denying Martin the opportunity to prove his case on his entitled day in court.

Despite having this information before it, the Second Circuit affirmed the decision of the District Court without specifically addressing the privity issue in its unpublished Order. Since the staff attorney bench memoranda on which the decision was based is not available for review by appellant (App., *infra*, a29), the reasoning behind the decision with respect to the issue of privity is kept secret.

The only rational explanation for this has been addressed above in relation to Martin's first three questions, to wit: mass-produced, rubber-stamped, secret justice, particularly for *pro se* parties, the contents of the appellants' briefs apparently disregarded and, given the workload, maybe never even read.

The long established identity of incentive standard for privity has been eliminated. This new, broadened, unprecedented definition of privity contained in an affirmed district court decision that henceforth can be cited as precedent will stand unless this Court intervenes. For this reason this petition should be granted.

CONCLUSION

For all the foregoing reasons, Martin requests this Court grant this Petition and either review the Second Circuit's Summary Order, specifically the questions presented herein, or vacate and remand that portion of the Summary Order in this case dated November 7, 2002 which granted privity to respondent Qulia.

Dated: January 29, 2003

Respectfully submitted,

Thomas A. Martin
Petitioner
522 –107 Aberdeen Drive
Chapel Hill, NC 27516
(919) 960-4237

Syny
99-cv-1667
Scullin, Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 7 day of Nov, two thousand and two.

PRESENT:

HON. PIERRE N. LEVAL,
HON. GUIDO CALABRESI,
HON. BARRINGTON D. PARKER, JR.,

Circuit Judges,

THOMAS A. MARTIN,
Plaintiff-Appellant,

v. No. 01-9267(L)

KEYCORP, KEY BANK NATIONAL ASSOCIATION (f/k/a KEY BANK OF NEW YORK, N.A., KEY BANK OF SOUTHEASTERN NEW YORK), ROBERT G. QULIA,
Defendants-Appellees.

For Plaintiff-Appellant: THOMAS A. MARTIN, *pro se*, Chapel Hill, NC

For Defendants-Appellees: MICHAEL J. SMITH, His cock & Barclay, LLP, Albany, NY

Appeal from the United States District Court for the Northern District of New York (Scullin, *Chief Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED**.

Thomas A. Martin appeals from three ruling of the United States District Court for the Northern District of

New York (Scullin, *C.J.*). In a September 29, 2000 decision and order, the district court denied Martin's motion for recusal, granted the defendants' motion for summary judgment, denied the defendants' request for Rule 11 sanctions, and permanently enjoined Martin from commencing additional federal actions relating to the events surrounding that case. Martin subsequently filed a 60(b) motion for reconsideration of this order. On September 27, 2001, the district court denied Martin's motion for reconsideration and ordered Martin to show cause why he should not be sanctioned under Fed. R. Civ. P. 11 for filing the 60(b) motion. Finally, on December 10, 2001, the district court imposed Rule 11 sanctions, directing Martin to reimburse the defendants for reasonable attorneys' fees and other expenses relating to his motion for reconsideration.

The events underlying this case and the long history of litigation they have given rise to are fully described in the district court's decision of September 29, 2000. *Martin v. Key Corp.*, No. 99-CV-1667, slip op. At 2-6 (N.D.N.Y. Sept. 29, 2000).

We have examined the record and conclude that the district court properly granted the defendants' motion for summary judgment, since all of Martin's claims were barred by res judicata and collateral estoppel. It is also clear from the record that the district court did not abuse its discretion in denying Martin's motion for recusal, as there was no showing of bias. Nor did the court abuse its discretion in denying Martin's 60(b) motion for relief from a final judgment,

since Martin failed to indicate any controlling decisions or data overlooked by the court that could reasonably be expected to alter its decision. The imposition of Rule 11 sanctions for filing the 60(b) motion was also well within the district court's discretion in view of the complete meritlessness of that motion. Moreover, given Martin's long history of repeated attempts to relitigate claims already adjudged against him, we find no error in the district court's injunction against future filings.

We have considered all of Martin's arguments and find them without merit. Accordingly, we AFFIRM the judgment of the district court.

For the Court,
ROSEANN B. MACKECHNIE,
Clerk of the Court

by: s/Lucille Carr

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS A. MARTIN,

Plaintiff,

v.

99-CV-1667
(FJS/RWS)

KEY CORP., KEY BANK NATIONAL ASSOCIATION (f/k/a KEY BANK OF NEW YORK, N.A., KEY BANK OF EASTERN NEW YORK, N.A., KEY BANK OF SOUTHEASTERN NEW YORK), ROBERT G. QULIA

Defendants.

APPEARANCES OF COUNSEL

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2602 Winningham Road
Chapel Hill, NC 27516
Plaintiff

HISCOCK & BARCLAY, LLP — MICHAEL J. SMITH, ESQ.

40 Beaver Street, Fourth Floor
Albany, NY 12207-1511
Attorneys for Defendants

SCULLIN, Chief Judge

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

This case was originally commenced in the United States District Court for the Middle District of North Carolina on October 21, 1997 and transferred to the Northern District of New York after the North Carolina Court determined that it lacked personal jurisdiction over Defendants.[1]

Presently before the court are Plaintiff's motion for recusal of the Honorable Frederick J. Scullin, Defendants' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and Defendants' motion for Rule 11 sanctions and a permanent injunction.

II. BACKGROUND[2]

The present case emerges from a long history of cases which relate to Plaintiff's 1992 bankruptcy filing. Defendant Key Bank National Association (f/k/a Key

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[1] In the original complaint, Joseph C. Papa was listed as a Defendant. However, Papa is not listed as a Defendant in the amended complaint, which was filed on December 19, 1997. Accordingly, Papa is not considered a party to the present case.

[2] This Court has enter orders in two related appeals, Martin v. Key Bank of New York, N.A. (In re Thomas A. Martin), Nos. 95-CV-264(L), 95-CV-107, and Martin v. Bank of New York, et al (In re Thomas A. Martin), Nos. 95-CV-651, 95-CV-652. These orders set forth the factual background of the case. Therefore, the underlying factual circumstances will be reiterated or expanded upon only as necessary to the disposition of the instant case.

Bank of New York) ("Key Bank"), a creditor of Plaintiff, commenced an adversary proceeding against Plaintiff alleging that Plaintiff converted items of personal property subject to Key Bank's lien. The adversary proceeding was tried in the Bankruptcy Court for the Northern District of New York in October of 1994 before the Honorable David T. Stosberg.[3] In the adversary proceeding, the Bankruptcy Court concluded that Plaintiff had violated 11 U.S.C. § 523(a)(6) by willfully and maliciously converting collateral that was subject to a security agreement. Judgment was entered for Key Bank in the amount of $189,956. The Bankruptcy Court also declined to discharge Key Bank's claim against Plaintiff.

The following is a brief history of cases that have involved Plaintiff and some or all of the present Defendants:

1. As discussed above, Key Bank, represented by Attorney Robert Qulia, commenced an adversary proceeding against Plaintiff. This proceeding related to Plaintiff's Chapter 7 bankruptcy case. In his affidavit, Plaintiff alleged that on March 10, 1993, Key Bank and its Trustee removed Plaintiff's personal property that it had no "claim of right, amounting to criminal conversion of the property." See Affidavit of Thomas A. Martin, attached to Affidavit of Michael J. Smith, Esq. ("Smith Aff."), Ex. 8 ¶ 7 ("Martin Aff. I"). The Bankruptcy Court's ruling was affirmed by this Court on appeal and also by the Second Circuit. See Smith Aff. Exs 10 & 11.

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[3] The Bankruptcy case is designated as 92-11502 and the adversary proceeding is designated as 93-91052.

In December 1995, Plaintiff filed a Fed. R. Civ. P. 60(b) motion, in which he alleged that on or about December 22, 1993, Key Bank permitted Paul Collins and others to remove items from the warehouse in which Plaintiff's property was being stored. See Aff. In Support of Rule 60(b) Motion, attached to Smith Aff. At Ex. 16 ¶ 7 ("Martin Aff. II"). Plaintiff also alleged that Qulia had ex parte communications with Judge Stosberg.[4] See Martin Aff. II ¶ 19. The Rule 60(b) motion was denied with prejudice. See Smith Aff. At Ex. 16. Plaintiff did not appeal this ruling.[5]

2. Following the Bankruptcy Court's ruling in the adversary proceeding, Plaintiff moved to conduct 2004 Examinations of various individuals including Qulia. The alleged purpose of this motion was to uncover

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[4] Plaintiff contends that on at least two occasions, Qulia had improper ex party [sic] contact with Judge Strosberg and during these conversations alleged that Plaintiff threatened him and a witness. Plaintiff contends that this prejudiced the Judge against Plaintiff. See Amended Complaint { 17. Plaintiff alleges that as a result of these ex parte communications, Judge Stosberg read a statement into the record. The following is one of the statements to which Plaintiff refers:

> [O]n November 1, 1994, I was informed by the Deputy Clerk, Mr. Brennan and the court reporter, Ms. Millett, that after the conclusion of the arguments and after the Court left the courtroom that Mr. Martin made some remarks directed to Mr. Qulia which were characterized in a quote as a legal threat and that he also told Mr. Qulia... "I will get you."

See Transcript of Adversary Proceeding No. 93-91052, attached to Aff. in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment Ex. B.

[5] The parties to the adversary proceeding and the Rule 60(b) motion include Martin and Key Bank of New York (f/k/a Key bank [sic] of New York N.A., Key Bank of Eastern New York N.A., and Key Bank of Southeastern New York N.A.).

new evidence that the Bankruptcy Court's ruling of December 20, 1994, was incorrect. In particular, Plaintiff stated that he sought to uncover information about the March 10, 1993, seizure. See Martin Affidavit at ¶ 5, attached to Smith Aff. at Ex. 14 ("Martin Aff. III"). Plaintiff also wanted to question Qulia about entering the warehouse in which the bankruptcy estate was being kept and allowing others to remove items from the warehouse. See Martin Aff. III at p. 6. In addition, Plaintiff raised the issue of John B. Warner III's compensation from Key Bank as further support for his motion. See Reply Brief of Appellant Thomas A. Martin at 10, attached to Smith Aff. Ex. 15. Warner was a court-appointed appraiser and a witness for Key Bank at the adversary proceeding. Plaintiff also alleged that there was conduct rising "to the level of a conspiracy between Appellee, Trustee, Court-appointed auctioneer / appraiser, and certain [of Key Bank's] witnesses at the trial of Adversary Proceeding 93-91052 (RJS), to manipulate this bankruptcy case for the benefit of the alleged creditor, Key Bank, and to the detriment of all other parties in interest." Plaintiff also raised the issue of due process and intentional suppression of evidence. See Reply Brief of Appellant Thomas A. Martin at 14 & 16, attached to Smith Aff. Ex. 15.

In March of 1995, the Bankruptcy Court denied Plaintiff's motion and granted sanctions against him under Federal Rule of Bankruptcy Procedure 9011.[6] See Smith Aff. Ex. 12. This Court affirmed the decision.

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[6] The Bankruptcy Court also noted that Plaintiff's "present approach can only be viewed as harassment that borders on an obsession that unfairly

See Smith Aff. Ex. 13, at 6. The Second Circuit also affirmed the decision.[7] See Martin v. Schaap Moving Sys., Inc., No 97-5042, 1998 WL 405966, *2 (2d Cir. April 20, 1998).

3. On October 16, 1995, Plaitiff filed a complaint in Bankruptcy Court against Key Bank and three other Defendants. In his complaint, Plaintiff alleged that Key Bank conspired with Michael J. O'Connor, Elias Caden, and Warner. See Complaint ¶¶ 34 & 45, attached to Smith Aff. Ex. 19. Bankruptcy Judge John J. Connelly granted summary judgment to all Defendants. See In re Martin, 201 B.R. 338 (Bankr. N.D.N.Y. 1996). The Bankruptcy Court applied the doctrine of collateral estoppel to several of Plaintiff's claims including the alleged conflict that existed because of Warner's receipt of compensation from Key Bank. Id. at 345-46. The judgment was affirmed by this Court and by the Second Circuit in a summary order. See Smith Aff. Ex. 21; Smith Aff. Ex. 22.[8]

4. On September 16, 1997, Plaintiff filed a motion with the Bankruptcy Court pursuant to Fed. R. Civ. P. 52(b) and 59(a) seeking a new trial in the *Key Bank v. Martin* adversary proceeding, 93-91052 (discussed above). In his motion papers, Plaintiff raised several issues that he had already brought to the attention of

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creates costs, anxiety, and perhaps even fear among the parties he seeks to examine." See Smith Aff. Ex. 12.

7 The Second Circuit rejected this Court's application of the doctrine of *res judicata* but affirmed the decision on other grounds. See Martin v. Schapp Moving Sys. Inc., No. 97-5042, 1998 WL 40596, *3 (2d Cir. April 20, 1998).

8 Michael J. O'Connor, Chapter 7 Trustee; Key Bank of New York, N.A., Elias Cadan; and John B. Warner II were the defendants in this action.

various courts, including the issue of ex parte communication between Qulia and Judge Stosberg. See Affirmation of Thomas A. Martin ¶¶ 9, 17, attached to Smith Aff. Ex. 23. The Bankruptcy Court denied Plaintiff's motion for a new trial. See Smith Aff. Ex. 24.

In the present case, Plaintiff is alleging that his civil rights were violated as a result of Defendants' activities surrounding the adversary proceeding. Plaintiff alleges the following in his amended complaint: (1) on March 10, 1993, Defendants, while acting on a writ of assistance, without authority, seized personal files, documents and financial records of Plaintiff; (2) on December 23, 1993, Qulia entered a warehouse in which the property of the bankruptcy estate was being kept, and allowed at least three individuals to remove items from the warehouse; (3) Qulia conferred and conspired with officers of Key Corp with respect to strategies to be employed at trial, including the obstruction of justice; (4) Defendants engaged in witness tampering and/or failed to disclose the fact that Warner was receiving compensation from Key Bank; (5) Qulia entered into a conspiracy and had ex parte communications with Bankruptcy Court Judge Stosberg.

Plaintiff brings his claim under the following theories: (1) deprivation of Plaintiff's rights under the Fifth and Fourteenth Amendments of the United States Constitution pursuant to 42 U.S.C. § 1983; (2) a civil conspiracy by Defendants thereby violating Plaintiff's rights under the Fifth and Fourteenth Amendments of the United States Constitution pursuant to 42 U.S.C. § 1985(2) and (3); and (3) an intentional and malicious

denial of Plaintiff's constitutional rights by Defendants thereby entitling Plaintiff to punitive damages.

III. DISCUSSION

A. Recusal

Plaintiff moves for recusal of Judge Scullin pursuant to 28 U.S.C. §§ 144 and 455. Based upon the record before the Court, there is no showing of bias. It is also important to note that this court has previously denied Plaintiff's request for recusal and the Second Circuit has determined, on two separate occasions, that there has been no showing of bias by Judge Scullin against Plaintiff.[9] See Smith's Aff. in Opposition to Plaintiff's Recusal Motion Exs. 2 & 3. Accordingly, the Court denies Plaintiff's motion for recusal.

B. Plaintiff's § 1983 and § 1985 Claims

Plaintiff alleges violation of certain of his Constitutional rights, pursuant to 42 U.S.C. § 1983. To maintain a x 1983 claim, there must be a showing of state action. See Conn v. Gabbert, 526 U.S. 286, 290, 119 S.Ct. 1292, 1295, 143 L.Ed.2d 399 (1999) ("Section 1983 provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights"); see also United States v. Morrison, 120 S. Ct. 1740, 1757, 146 L.Ed.2d 658 (2000). After a review of the record, the Court finds no showing that Defendants were acting under color of state law.

To bring a claim under the second clause of §

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[9] The alleged incidents of bias cited by Plaintiff all occurred prior to the filing of this case with one exception. Plaintiff alleges that the present Defendants' request to have Judge Scullin assigned to this case shows bias.

1985(2) and the first clause of § 1985(3), a plaintiff must show that there is some racial or otherwise class-based discriminatory animus. See Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 267-68, 113 S. Ct. 753, 758, 122 L.Ed.2d 34 (1993); Bretz v. Kelman, 773 F.2d 1026, 1029 (9th Cir. 1985); Zemsky v. City of N.Y., 821 F.2d 148, 151 (2d Cir. 1987); Beyah v. Scully, No 91 Civ. 2720, 1992 WL 51564, * 3 (S.D.N.Y. Mar. 13, 1992) (citations omitted). This issue is not addressed by the parties and Plaintiff does not indicate upon which causes of § 1985 (2) and (3) he is relying. However, a review of the record before the Court indicates that Plaintiff has failed to alleged [sic] any race or other class-based discrimination. Additionally, conspiracy allegations that are conclusory statements are insufficient as a matter of law to support a § 1985 conspiracy cause of action. See Fariello v. Rodriguez, 148 F.R.D. 670, 685 (E.D.N.Y. 1993) (citations omitted).

Accordingly, the Court grants Defendants' motion for summary judgment with respect to Plaintiff's § 1983 and § 1985 claim for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

C. Res Judicata

Alternatively, even if Plaintiff's complaint could be read to adequately plead § 1983 and § 1985 claims, Plaintiff's claims are subject to dismissal on the basis of res judicata and collateral estoppel.

The doctrine of *res judicata*, or claim preclusion, "applies to preclude later litigation if the earlier decision was (1) a final judgment on the merits, (2) by a court of competent jurisdiction, (3) in a case involving

the same parties or their privies, and (4)involving the same cause of action." In re Teltronics Servs., Inc., 762 F.2d 185, 190 (2d Cir. 1985).[10]

Plaintiff contends that there has never been a final judgment on the merits of his civil rights claims and that *res judicata* is not applicable because Key Corp and Qulia were not parties or privies to the parties involved in the prior cases.

As outlined above, the prior decisions relevant to the present motion include an adversary proceeding, a Rule 60(b) motion, a motion to conduct 2004 Examinations, a complaint filed on October 16, 1995 in Bankruptcy Court and a motion filed pursuant to Fed. R. Civ. P. 52(a) and 59(b), as well as the appeals that arose out of these cases. In those cases, Plaintiff repeatedly raised the same issues and judgments have continually been rendered against him.[11]

The prior cases have involved Key Bank, but Key Corp. and Qulia have not been parties in these prior cases. However, there is adequate privity between Key Bank and the other Defendants to justify the applica-

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[10] As a preliminary matter, Plaintiff contends that the Court should reject Attorney Michael J. Smith's Affidavit, submitted in support of Defendants' motion for summary judgment, because it is adversarial and not based on personal knowledge. The Court finds no merit in this argument.

[11] It is important to note that denial of a Rule 60 motion and a motion for a new trial are *res judicata* as to subsequent independent actions involving the same issues. See 47 Am Jur2d *Judgements* [sic] §§ 800, 884 (1995); see also Morgan Consultants v. American Tel. And Tel. Co., 546 F. Supp. 844, 847 n. 4 (S.D.N.Y. 1982); Locklin v. Switzer Bros., Inc., 335 F.2d 331, 332 (7th Cir. 1964), *rehear den'd*, 380 U.S. 926 (1965).

tion of the doctrine of *res judicata*.[12] See Browning Debenture Holders' Comm. v. Dasa Corp., 454 F. Supp. 88, 104 (S.D.N.Y. 1978) (court deemed lawyer to be a privy to party he represented in prior action); Capraro, et al., v. Tilcon Gammino, Inc., 751 F.2d 56, 59 (1st Cir. 1985) (court found that "[i]n as much as the subsidiary is not liable, because action against it is barred by the doctrine of res judicata, it follows that the parent corporation is not to be held liable for what its subsidiary did at its direction"); see also Henry v. Farmer City State Bank, 808 F.2d 1228, 1235 n. 6 (11th Cir. 1986).

The fourth prong of the *res judicata* analysis requires that the claims be based on the same cause of action, but "does not mean that the claims alleged be identical...." Fonseca v. Columbia Gas Sys., Inc., 37 F. Supp. 2d 214, 223 (W.D.N.Y. 1998) (citations omitted). Rather, the critical inquiry is whether the claims "center on the same transaction or series of transactions, or they arise from a 'single core of operative facts....'" Id. (citations omitted). Plaintiff's claims all relate to the adversary proceeding or to issues surrounding that proceeding such as the "seizure" of Plaintiff's property.

For the reasons stated above, the Court finds that the requirements for application of *res judicata* are present. Accordingly, the Court finds that Plaintiff's claim is barred under the doctrine of *res judicata* and Defendants' motion for summary judgment is granted.

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[12] Key Bank is a "wholly owned subsidiary of [D]efendant Key Corp." See Amended Complaint ¶ 9.

D. Collateral Estoppel

Collateral Estoppel applies when: "(1) the issues of both proceedings [are] identical, (2) the relevant issues were actually litigated and decided in the prior proceeding, (3) there [was] a 'full and fair opportunity' for the litigation of the issues in the prior proceeding, and (4) the issues were necessary to support a valid and final judgment on the merits." Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A., 56 F.3d 359, 368 (2d Cir. 1995) (citation omitted). "Estoppel is applied when 'the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.'" United States v. Alcan Aluminum Corp., 990 F.2d 711, 719 (2d Cir. 1993) (quoting Lummus C. v. Commonwealth Oil Ref. Co., 297 F.2d 80, 89 (2d Cir. 1961))[sic].

As discussed above, Plaintiff raises the identical issues in this case as he has raised in numerous other proceedings. As the outline of Plaintiff's prior case reveals, these issues have all been the basis of at least one or more claims filed by Plaintiff and have also been dealt with on appeal.[13]

"An issue is 'actually litigated' when it 'is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined.'" O'Leary v.

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[13] Plaintiff contends that claim or issue preclusion should not apply to the issue of ex parte communications between Judge Stosberg and Qulia because Plaintiff did not have evidence to support his theory until 1997. Plaintiff acknowledges that he did raise the issue of Qulia's ex parte communications with Judge Stosberg in his Rule 59 motion for a new trial, but claims that the Court "specifically said the issue could be pursued at a

Liberty Mut. Ins. Co., 923 F.2d 1062, 1066 (3d Cir. 1991) (quoting Restatement (Second) of Judgments § 27 comment d, at 255 (1982)). Plaintiff's allegations have been raised in prior pleadings and have been determined by this Court as well as the Bankruptcy Court and Second Circuit.

Furthermore, there is no showing that Plaintiff has not had a "full and fair opportunity" to litigate these claims. To the contrary, Plaintiff has continually raised these issues before courts over the course of the last several years and has continually been provided with an opportunity to submit pleadings on these issues. Through review of prior decisions, it is apparent that Plaintiff's allegations have been considered and that courts have continually ruled against Plaintiff.

For the reasons stated, the Court finds that Plaintiff's claims are barred by collateral estoppel. Accordingly, Defendants' motion for summary judgment is granted.

F. [sic] Rule 11 Sanctions and a Permanent Injunction

Defendants request the imposition of Rule 11 sanctions against Plaintiff, including an award of attorneys' fees to each Defendant. Although Plaintiff has shown a pattern of filing similar claims, the Court declines to impose sanctions. However, the Court finds that given

---

later time." See Pl.'s Mem. of Law in Opposition to Defs.' Motion for Summ. Judgment at 11. Plaintiff fails to acknowledge that although he may not have had "evidence" to support his theory of inappropriate ex parte communications, he raised the issue of the ex parte communications in his Fed. R. Civ. P 60(b) motion which was filed in December of 1995. See Martin Aff. II ¶ 19.

the litigation history between the parties, the imposition of a permanent injunction is appropriate.

In determining whether to restrict a litigant's future access to the courts, the district court "should consider the following factors: (1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties. Ultimately, the question the court must answer is whether a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties." Safir v. United States Lines Inc., 792 F.2d 19, 24 (2d Cir. 1986).

Plaintiff has shown a complete disregard for the decisions of the Second Circuit, this Court, and the Bankruptcy Court. His attempts to ignore these prior decisions have caused other parties to incur the expense of litigation. Although Plaintiff may be a *pro se* party, he has shown a unique familiarity with the courts and has continued to file claims to which there is no objective good faith expectation of success.

Accordingly, Plaintiff is enjoined from proceeding further in the instant action except to seek appellate review. Plaintiff is further enjoined from commencing additional federal court actions relating in anyway [sic]

to events surrounding the adversary proceeding, including, but not limited to, (1) the March 10, 1993 "seizure" of Plaintiff's files, documents and financial records; (2) the entry of Qulia and other individuals into the warehouse in which the property of the bankruptcy estate was being kept; (3) the alleged conspiracy between Qulia and Key Corp officers; (4) the testimony of John B. Warner; and (5) the alleged conspiracy between Qulia and Judge Stosberg.

IV. Conclusion

After carefully considering the entire file in this matter, the submissions of the parties, and the applicable law, it is hereby

ORDERED that the Plaintiff's motion for recusal is DENIED; and it is further

ORDERED that Defendants' motion for summary is GRANTED; and it is further

ORDERED that Defendants' motion for Rule 11 sanctions is DENIED; and it is further

ORDERED that a permanent injunction is issued against Plaintiff; and it is further

ORDERED that the Clerk of the Court is to enter judgment in favor of Defendants and to close this case.

IT IS SO ORDERED.

Dated:September 29, 2000
Syracuse, New York

s/FI Scullin
Frederick J. Scullin, Jr.
Chief United States District Judge

U.S. Constitution: Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 28 Section 453. Oath of justices and judges
Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of this office: "I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God."

Section 1254. Courts of appeals; certiorari; certified questions
Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition

of any party to any civil or criminal case, before or after rendition of judgment or decree.

Title 28 Section 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

Title 28 Section 1654. Appearance personally or by Counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct cases therein.

United States Court of Appeals for the Second Circuit Local Rule 0.23
Dispositions in Open Court or by Summary Order

The demands of an expanding case load require the court to be ever conscious of the need to utilize judicial

time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.

Where a decision is rendered from the bench, the court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, thecourt may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.

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Buffalo, New York
Carthage, New York
Long Island, New York

Rochester, New York
Syracuse, New York
Watertown, New York
Seattle, Washington

October 11, 1994

Ms. Virginia Martin
RR#1 Box 385
Styvesant, New York 12173

Re: Key Bank v. Thomas Martin
Adv. Pro. No. 93-91052

Dear Ms. Martin:

Thank you for accepting service of the enclosed subpoena by mail. Also, enclosed please find a check payable to yo [sic] for witness fee and mileage.

As you may be aware, a number of the items of art and antiques subject to Key Bank's lien turned up missing when the contents of the former Martin residence and office were inventoried. According to the March 1988 security agreement, you had an ownership interest in the items together with Thomas Martin and Kinderhill Investment Company. The purpose of your testimony is:

1. To establish you have not possessed any of the missing items of collateral; and
2. That you are not aware of any trust agreement (s) to which Thomas Martin is party that would result in any of the missing collateral being transferred into a trust for Thomas Martin's children by previous marriages.

I do not anticipate that you [sic] involvement will require the entire afternoon. In any event, please do not hesitate to contact me should you or your attorney have any questions or concerns regarding this matter.

Very truly yours,
HISCOCK & BARCLAY
s/Robert Qulia
Robert G. Qulia

RGQ/nlm
Enclosures
cc: Gregory G. Harris, Esq.
Harris & Bixby

Second Judicial Circuit of the United States
United States Courthouse
40 Foley Square - Room 2904
New York, New York 10007
(212) 857-8700 Phone
(212) 857-8680 Facsimile

John M. Walker, Jr.
Chief Judge

Karen Greve Milton
Circuit Executive

December 13, 2000

Mr. Thomas A. Martin
2602 Winningham Road
Chapel Hill, North Carolina 27516

Re: Handling of Pro Se Cases in the Second Circuit

Dear Mr. Martin:

I am writing in response to your November 6, 2000 letter in which you requested that I clarify how our Court handles *pro se* cases. Bench memoranda in *pro se* appeals and motions and counseled civil motions are prepared by law clerks in the Court's Staff Attorney's Office. These bench memoranda are sent by the Staff Attorney's Office to a panel of three judges who decide

each of these appeals and motions.

Counseled civil and criminal cases are sent directly to chambers where chambers law clerks prepare bench memoranda; thus an increase in counseled civil and criminal filings, the increase then Chief Judge Winter commented on in his 1999 Report of the Court of Appeals, directly affects the workloads in chambers. Increases in *pro se* filings also affect the workload of chambers; but in these cases, Staff Attorney Law Clerks assist chambers by preparing bench memoranda on these matters.

Thank you for your interest in our Court. I trust you will find this information helpful.

Very truly yours,

s/Karen Greve Milton
Karen Greve Milton

cc: Chief Judge Walker
Elizabeth Cronin, ACE for Legal Affairs

Second Judicial Circuit of the United States
United States Courthouse
40 Foley Square - Room 2904
New York, New York 10007
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John M. Walker, Jr. (212) 857-8700
Chief Judge

Karen Greve Milton
Circuit Executive

December 13, 2001

Mr. Thomas A. Martin
522-107 Aberdeen Drive
Chapel Hill, North Carolina 27516-4014

Re: Handling of *Pro Se* Cases in the Second Circuit

Dear Mr. Martin:

I am writing in response to your October 23, 2001 letter in which you requested explanation of my previous letter to you. You requested the following information regarding the Staff Attorney law clerks in the Second Circuit:

a Staff Attorney law clerks are hired using criteria identical to the hiring of chambers' law clerks. That is, both are required to possess a Juris

Doctor from an accredited law school;

b Yes, the starting salary is identical for both groups;

c Yes, three-judge panels decide both *pro se* and counseled cases in our court; and

d Yes, bench memoranda may include the auth or's evaluation of the merits of the issues on appeal and offer recommendations for decision. The contents of bench memoranda are confi dential. The documents are not subject to dis closure under the Freedom of Information Act.

Thank you again for your interest in our Court. I trust you will find this information helpful.

Very truly yours,
s/Karen Greve Milton
Karen Greve Milton

KGM/jdk

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Chief Judge

Karen Greve Milton
Circuit Executive

January 3, 2002

Mr. Thomas A. Martin
522-107 Aberdeen Drive
Chapel Hill, North Carolina 27516-4014

Re: Handling of *Pro Se* Cases in the Second Circuit

Dear Mr. Martin:

I am writing in response to your letter of December 20, 2001. You requested the following information regarding the Second Circuit:

1. In SY 2000 (October 1, 1999-September 30, 2000), 4931 appeals were filed in the court 2063 were pro se; 2868 were counseled. 5068 cases

were terminated in that period (which includes decisions on the merits, as well as dismissals and withdrawals); and

2. Beginning August 2000- August 2001, the Court employed 68 judicial law clerks and 21 staff attorney law clerks. All were qualified to write bench memoranda.

Thank you again for your interest in our Court. I trust you will find this information helpful.

Very truly yours,
s/Karen Greve Milton
Karen Greve Milton

KGM/jdk

Supreme Court, U.S.
FILED
MAR 7 2003

No. 02-1150

IN THE

Supreme Court of the United States

THOMAS A. MARTIN,

Petitioner,

v.

KEYCORP, KEY BANK NATIONAL ASSOCIATION and ROBERT G. QULIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

MICHAEL J. SMITH
Counsel of Record
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(518) 434-2163

Attorneys for Respondents

179502

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

KeyCorp is a publicly held and traded bank holding company and has no parent corporation and no publicly held company owns 10% or more of its stock. KeyBank National Association (f/k/a Key Bank of New York, N.A. and Key Bank of Southeastern New York) is a wholly owned bank subsidiary of KeyCorp.

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TABLE OF CITED AUTHORITIES

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CASES:

Carino v. Town of Deerfield, 750 F. Supp. 1156 (N.D.N.Y. 1990), *aff'd without op.*, 940 F.2d 649 (2d Cir. 1991) 6

STATUTES:

42 U.S.C. § 1983 ..... 3, 5

42 U.S.C. § 1985 ..... 3, 5

RULES:

U.S. Sup. Ct. R. 10 6

REASONS FOR DENYING THE PETITION

This matter, that, unbelievably, has actually reached the point of a petition for a writ of certiorari to the Supreme Court of the United States, started with the Petitioner's filing of a *pro se* complaint in the United States District Court for the Middle District of North Carolina. Upon the Respondents' jurisdictional motion, the case was transferred to the Northern District of New York. The Petitioner's complaint alleged that the Respondents conspired to violate the Petitioner's federal constitutional rights in their efforts to collect a debt owed to the Respondents. The District Court granted the Respondents' summary judgment motion dismissing the complaint, denied the Petitioner's motion for recusal of the District Court Judge and granted the Respondents' motion for an injunction preventing the Petitioner from filing future litigation regarding the issues raised by Petitioner in the complaint. The Petitioner then filed a motion for reconsideration of the District Court's decision. The District Court denied Petitioners' motion for reconsideration and issued an order to show cause requiring the Petitioner to show cause why he should not be further sanctioned for filing a baseless motion for reconsideration. The District Court eventually issued an order sanctioning the Petitioner for his frivolous reconsideration motion. The Petitioner then appealed to the Second Circuit: (1) the order granting summary judgment, denying recusal and granting an injunction; (2) the order denying Petitioner's motion for reconsideration; and (3) the order sanctioning Petitioner for the frivolous reconsideration motion. The Second Circuit, in a Summary Order, affirmed all three District Court rulings.

The Petition for Writ of Certiorari presents four (4) questions. The first three questions generally challenge various internal procedures of the Second Circuit and the circuit courts of appeal generally. Question One alleges that the use of unpublished opinions by the circuit courts of appeal and the restricted precedential value of unpublished opinions violates due process and equal treatment under the law. Question Two challenges the Second Circuit's procedures with regard to unpublished opinions. Question Three alleges that the Second Circuit's procedures regarding the handling of *pro se* cases are unconstitutional. As evidenced by the record herein, neither the Second Circuit's ruling below or any of the previous proceedings, raised the issues sought by the Petitioner to be reviewed in his first three questions. The Petitioner has not alleged that he has been treated differently than any other litigant regarding the use and affect of unpublished opinions and he has not alleged that he has been treated any differently than other similarly situated *pro se* litigant regarding internal court procedures. It is respectfully submitted that the Petition as to these three questions should be denied.

The only substantive question raised by the Petitioner is Question Four that raises the narrow issue of the ability of a private attorney representing a client to assert the *res judicata*/claim preclusion effect of a prior proceeding determined in favor of the client. The Petitioner alleges that the District Court and the Second Circuit misapplied the concept of privity as it relates to claim preclusion. The Petitioner's argument that the District Court's ruling on this issue creates new law and overlooks established precedent is simply wrong. Nor does the underlying ruling create a conflict within the Federal system or a conflict with New York State law on the issue. In addition, the District

Court's decision dismissing the Petitioner's complaint included grounds for dismissal other than claim preclusion, including failure to state a cause of action under 42 U.S.C. § 1983 and § 1985 and *issue* preclusion (collateral estoppel), neither of which are dependent on privity issues. Therefore, even if the District Court and Second Circuit erred in this ruling, it does not alter the outcome in any material respect.

I.

NEITHER THE RECORD BELOW OR THE DECISION BELOW RAISE THE QUESTIONS PRESENTED IN QUESTIONS ONE, TWO AND THREE OF THE PETITION

The issues presented in Questions 1, 2 and 3 of the Petition focus solely on court procedures involving the use of unpublished, summary orders and how *pro se* claims are handled by court personnel. None of the issues raised in these Questions were raised or litigated below or were addressed in either the District Court or the Second Circuit decisions. There is simply no basis to grant certiorari in this case to review these issues raised by the Petitioner here for the first time. It is respectfully submitted that to the extent that there is controversy within the legal community and/or the Federal courts regarding the use of summary orders and the handling of pro se complaints, this lawsuit is not the proper forum to air those differences or to determine that changes in procedure are needed.

II.

THE DISTRICT COURT'S RULING REGARDING CLAIM PRECLUSION, AFFIRMED BY THE SECOND CIRCUIT, DOES NOT CREATE A CONFLICT BETWEEN THE FEDERAL COURTS OR BETWEEN THE FEDERAL COURTS AND NEW YORK LAW

The Petitioner's underlying complaint in this matter alleged that the Respondents acted in concert to deprive him of his constitutional rights and wrongfully prevented him from obtaining a discharge in his bankruptcy. As outlined in the District Court's decision in this matter, this action is only one of many brought by Petitioner in connection with Respondent KeyBank's attempt to collect a debt owed by the Petitioner and the Petitioner's subsequent bankruptcy. This latest litigation is only the most recent attempt by Petitioner to raise legal and factual issues that have been repeatedly raised by Petitioner and determined against him. The Petitioner now uses the occasion of his Petition for certiorari to once again raise the same scurrilous and unsupported accusations against the Respondents. Needless to say, the Respondents once again reject and dispute the Petitioner's version of the underlying factual events in this case as set forth in the Petition and his conclusions regarding the District Court's motivations in deciding both this case and others. The Federal court system has given the Petitioner every opportunity to litigate these issues and, from the Respondents' point of view, has been consistently deferential to the Petitioner's *pro se* status. Despite the Petitioner's continuing play for sympathy, it is the Petitioner that comes

before this Court with unclean hands. As the District Court found in its decision below:

> Plaintiff has shown a complete disregard for the decisions of the Second Circuit, this Court, and the Bankruptcy Court. His attempts to ignore these prior decisions have caused other parties to incur the expense of litigation. Although Plaintiff may be a *pro se* party, he has shown a unique familiarity with the courts and has continued to file claims to which there is no objective good faith expectation of success.

See Petitioner's Petition at a18.

The decision of the District Court below, affirmed by the Second Circuit, dismissed the Petitioner's complaint based on a failure to state a cause of action under 42 U.S.C. § 1983 and § 1985 due to the Petitioner's failure to allege or show state action under § 1983 or racial or other class-based animus under § 1985. As an alternative basis, the District Court also found that the complaint must be dismissed on *res judicata*/claim preclusion grounds. The District Court determined that the same core issues raised in this litigation had already been unsuccessfully litigated by the Petitioner. The Petitioner argued that *res judicata* was not available as to Respondent Qulia because he was not a party to the previous litigation, or in privity with any party. The District Court properly determined that there was sufficient privity between attorney Qulia and Respondent KeyBank, whom Qulia represented in the previous proceedings, to afford Qulia *res judicata* protection in this action, involving the same issues. This is the narrow issue raised by Question Four of the Petition. The decision of the District Court in this regard

is not in conflict with either other Federal decisions at the District or Circuit Court level and is not in conflict with the law of New York. The cases cited by the Petitioner in the Petition do not lead to a contrary conclusion and do not address the particular factual situation present in this case and simply stand for the proposition that privity is an element of a *res judicata* defense. Even if one were to take issue with the District Court's decision in this regard, it is at best an "erroneous factual finding or the misapplication of a properly stated rule of law" under Rule 10 of the Supreme Court Rules and should not form the basis for a grant of certiorari.

In addition, the dismissal on *res judicata* grounds was only one of three separate grounds for dismissal, the first being failure to state a cause of action, as set forth above. In addition, the District Court separately determined that the complaint must be dismissed on collateral estoppel/issue preclusion grounds. Under issue preclusion, whether Qulia was in privity with a party in a previous proceeding is irrelevant. A defendant, such as Qulia in this action, does not need to have been a party, or in privity with a party, in a previous lawsuit to assert issue preclusion as a defense. Issue preclusion may be used defensively by a defendant seeking to prevent a plaintiff from re-litigating an issue that the plaintiff previously litigated unsuccessfully against *other defendants*. Defensive issue preclusion only requires that the party against whom preclusion is asserted (here the Petitioner) was a party in the earlier action. *See Carino v. Town of Deerfield*, 750 F. Supp. 1156 (N.D.N.Y. 1990), *aff'd without op.*, 940 F.2d 649 (2d Cir. 1991). Therefore, regardless of the ruling of the District Court on claim preclusion grounds, there was a sufficient independent basis on issue preclusion grounds to dismiss the complaint. There is therefor no basis to grant certiorari as to Question Four of the Petition.

CONCLUSION

For all the forgoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

MICHAEL J. SMITH
Counsel of Record
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Attorneys for Respondents

Supreme Court, U.S.
FILED
MAR 17 2003
OFFICE OF THE CLERK

(3)

No. 02 - 1150

In The

Supreme Court of the United States

Thomas A. Martin, Petitioner

v.

KeyCorp, Key Bank National Association (f/k/a Key Bank of New York, N. A., Key Bank of Southeastern New York), Robert G. Qulia.

Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

Thomas A. Martin
Petitioner, *Pro Se*
522-107 Aberdeen Drive
Chapel Hill, N.C. 27516
(919) 960-4237

6 pp

INTRODUCTION

The decision of the Second Circuit should not be allowed to stand because it was produced by an appellate process that violated Petitioner Thomas A. Martin's ("Martin") Fifth Amendment rights to equal treatment under the law in the several ways enumerated in the petition and, in addition, incorrectly conceded privity and issue preclusion to respondent Qulia.

Respondents' Brief In Opposition ("Resp. Brief") rests on four arguments each addressed below. The Brief's implication that Martin's relentless lay efforts to obtain justice have disentitled him to equal treatment does not merit rebuttal.

I.

MARTIN'S QUESTIONS ONE, TWO AND THREE RELATING TO CIRCUIT COURT PROCEDURES ARE APPROPRIATELY RAISED

Since the violations occurred subsequent to the circuit court record's closing, they could not have been raised previously. Furthermore, there is precedent for raising them in a petition for *certiorari*.

In 1976, this Court granted a writ of *certiorari* in the case decided by the decision *Browder v. Dir., Ill. Dept. of Corr.*, 434 U.S. 257 (1978) that included a question challenging unpublished opinions, an issue that had not

been raised by *Browder* below.

If not properly raised at this stage of a proceeding or in this forum, a citizen would be denied recourse; i. e. the opportunity to challenge the process and assert one's right to equal treatment.

II.
DISTRICT COURT'S DECISION WITH RESPECT TO 42 U.S.C. SEC. 1985 (2) WAS IN ERROR

Respondents argue (Resp. Brief, p. 3 & 5) that since District Court dismissed Martin's complaint for failure to state a cause of action with respect to section 1985 (2), any other District Court errors are irrelevant. The problem with this argument is that District Court's holding that a 1985 (2) complaint required an allegation of racial or other class based animus is incorrect. This Court in *Kush v. Rutledge*, 460 U.S. 719, 720 (1983) clearly held to the contrary.

This District Court error was specifically identified for appellate review by Martin in his brief to the Second Circuit but was not addressed by that court in its unpublished summary order affirming District Court's decision.

Respondents' reliance on what they clearly know is an error should undermine the credibility of their brief.

III.
PRIVITY

Respondent's arguments with respect to the issue of privity, Rep. Brief, p. 5-6, are simply in error. They claim that the District Court decision conceding privity to Qulia is not in conflict with other Federal decisions or with the law of New York, yet they fail to support their argument by citing any case law, statute or rule for there are none.

Finally, Respondents effectively concede their argument is without merit and seek refuge in Rule 10 of this Court. Martin's counter argument is: had his circuit court appeal been properly and fairly addressed, this obvious district court error would have been corrected. The affirmed district court decision is bad new law that should not be allowed to stand.

IV.
DEFENSIVE ISSUE PRECLUSION

Respondent's argument with respect to defensive issue preclusion (Resp. Brief, p. 6) is flawed in several respects. First, Respondents never specifically raised the argument until their appellees' brief to the circuit court, and it therefore is irrelevant.

Second, even if properly raised in district court, the

requisite conditions are not present. The issue Respondents wanted precluded had never actually been litigated and was therefore not essential to any prior judgment. Bankruptcy court rejected their identical argument at a hearing in 1997.

Furthermore, as this Court held in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) defensive preclusion is inoperative if the party against whom it is pleaded did not have a full and fair opportunity to litigate the issue or if the Court finds it unfair to permit its preclusion. Since the one issue that would theoretically be precluded under this theory related to attorney Qulia's prohibited *ex-parte* contacts with the trial judge, the court, on the grounds of fairness, should have denied its use even if the other tests were met.

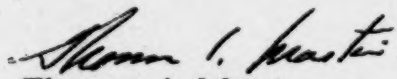
Finally, the second incorrectly precluded issue relates to Qulia's having arranged for a 1994 trial witness to commit perjury. Since this wasn't discovered until the year 2000, it therefore had never been raised, much less litigated, prior thereto. Defensive preclusion could not possibly apply. Yet the district court decision precluded it.

Each of the foregoing arguments relative to defensive issue preclusion were presented to the Second Circuit in Martin's briefs, but to no avail. Had the appeal not been segregated and had it been given thorough consideration, a different result would have been highly probable.

CONCLUSION

Respondents' request that this Court deny Martin's petition should, in fairness, be rejected since, for the foregoing reasons, their arguments are without merit.

Respectfully submitted,



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